IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1829

JESSE M. McDONNEL,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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OPINIONS BELOW

THE DISTRICT COURT DID NOT WRITE AN OPINION. THE OPINION OF THE COURT OF APPEALS IS ATTACHED TO THE APPENDIX AND IS PUBLISHED IN ___ F2d 2648.

JURISDICTION

(i) The original decision of the Court was entered April 14, 1977

(ii) The petition for rehearing was denied May 24, 1977.

(iii) This Court has jurisdiction to review the judgment of the Court of Appeals for the Fifth Circuit by writ of certiorari pursuant to Title 28, U.S.C. Section 1254(i).

QUESTIONS PRESENTED FOR REVIEW

IF A DEFENDANT HAS GIVEN FORCED TESTIMONY TO A BANKRUPTCY TRUSTEE UNDER DERIVATIVE USE IMMUNITY, ARE FEDERAL PROSECUTORS THEREAFTER FREE TO CONDUCT A SECRET INTERROGATION OF THE TRUSTEE?

IF SO, ARE THE PROSECUTORS THEN EXCUSED IN LATER CRIMINAL PROCEEDINGS FROM SHOWING AN INDEPENDENT SOURCE OF THEIR EVIDENCE?

IS THE DEFENDANT FIRST REQUIRED TO SHOW A PROBABLE MIS-USE OF IMMUNIZED TESTIMONY?

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. 11 U.S.C. §25a(10)

> ". . . at the first meeting of his creditors, at the hearing upon objections, if any, to his discharge, and at such other times as the Court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors, and other persons, the amount, kind,

> and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate or the granting of his discharge; but no testimony, or any evidence which is directly or indirectly derived from such testimony, given by him shall be offered in evidence against him in any criminal proceeding, except such testimony as may be given by him in the hearing upon objections to his discharge . . .".

STATEMENT OF THE CASE

Defendant was a partner in a business which engaged in the business of selling silver coins. In May of 1974, after fourteen months of operation, the business, and the Defendant, were declared bankrupts. The Defendant appeared before the Trustee in Bankruptcy for examination, pursuant to an order of the Bankruptcy Judge.

Thereafter, in June of 1976, the Defendant was indicted for mail fraud, stemming from misrepresentation and omissions in the public sale of silver coins. The Trustee in Bankruptcy appeared as a witness in the trial, and on cross-examination it was learned for the first time that there had been an ex parte conference between the Trustee and the prosecution. The Trustee conceded that he sought to assist the prosecution, but denied that he provided any information learned from his own forced examination. The prosecution itself stands moot, and has never declared any independent source for its evidence.

BASIS FOR ORIGINAL JURISDICTION

Indictment by Federal Grand Jury for Violation of 18 U.S.C. §1341.

ARGUMENT

The Court of Appeals has decided a federal question in conflict with the opinion of this Court in *Kastigar v. United States* (1972) 406 U.S. 441.

Appellant believes that there is an important policy issue presented in this case which transcends the question of guilt or innocence of any particular defendant. This issue deals with the apparent circumvention of the limited use immunity, whether it be intentional or accidental, actual or potential.

There are times when society demands information which is not obtainable because of the Fifth Amendment privilege. That need has been met in recent times by the granting of use and derivative use immunity under 18 U.S.C. §§6002-3. When such immunity has been granted, then the reluctant witness can be compelled to testify even over his Fifth Amendment Plea. There have been a number of cases affirming the obligation so to testify. *Kastigar v. United States* (1972) 406 U.S. 441; *U.S. v. Leyva* (5th Cir. 1975) 513 F2d 774; *U.S. v. Kelly* (5th Cir. 1972) 464 F2d 709.

There is a price, however, which society must pay when it forces the waiver of an individual's Fifth Amendment privilege. As this Court has ruled, once a Defendant shows that he has testified under a grant of immunity, then there is a "heavy burden" which shifts

to the government to show that all of the evidence it uses comes from legitimate independent sources.

Section 7a(10) of the Bankruptcy Act, 11 U.S.C. §25a(10) was amended by Section 207 of the Organized Crime Control Act of 1970 to provide a use and derivative use immunity to all compelled testimony of bankrupts, forbidding the use of such testimony . . . "or any evidence which is directly or indirectly derived from such testimony". The legislative history of that amendment to the Bankruptcy Act has been detailed in *United States v. Seiffert* (5th Cir. 1974) 501 F2d 974.

Just as in the grand jury area, efforts by bankrupts to avoid testifying have now been unsuccessful, and upon the same reasoning, that the immunity granted is co-extensive with the privilege. *Block v. Consino* (9th Cir. 1976) 535 F2d 1165. *United States v. Wilcox* (5th Cir. 1971) 450 F2d 1131.

Here, the Defendant testified as a bankrupt pursuant to Court order, so that the immunity attached. (Tr. 254, 262). It has become a common, and statutory practice in bankruptcy cases where there is a pending investigation for the agency involved to appear at the first meeting of creditors, announce its presence and then to request on the record that neither the transcript nor its contents be disclosed to it by any person present, and then to withdraw.

This practice was not followed in the present case, but, to the contrary, the attorney for the Defendant developed the fact during the trial that both the United States Attorney and the postal inspector had con-

ducted an ex parte interrogation of the Trustee. (Tr. 310). The Trustee in Bankruptcy conceded the interrogation and admitted that he "attempted to assist them" (Tr. 262). On the other hand, he asserted that he was able to separate in his own mind information learned in or from the compelled examination, and did not disclose that. (Tr. 263).

Whether the Trustee in Bankruptcy was really able to perform that mental gymnastic successfully is not the heart of the problem since it is the practice which must be condemned. A Trustee is elected by the creditors at the first meeting of creditors, sometimes being legally trained and sometimes not. The hazard of harm is just too great to permit one's Constitutional rights to rest upon a layman's conception of what may or may not be the fruit of privileged testimony. Indeed, he often may not even know himself since he normally will employ accountants and attorneys to conduct further investigations, and they certainly will use the transcripts of the compelled testimony if only for leads. As the Trustee receives back reports of their progress, he could, in all innocence, not realize that some of the facts reported were derived from the bankrupt's testimony.

This situation is also distinguishable from testimony compelled before a Grand Jury in which a United States Attorney will hear the testimony, even though the same privilege may apply. First, the Federal Attorney is legally trained and under oath to follow and apply the laws of the United States, although the same is not true of a Trustee in Bankruptcy. Second, when the prosecution interrogates a Trustee in Bankruptcy they themselves have no way

of knowing what facts they receive may violate the compelled testimony since they do not know what that testimony concerned. The prosecutor here conceded that he is "not allowed to touch those. Never seen those (transcripts)." (Tr. 213).

Since a bankrupt is now required, by pain of contempt, to testify and since he is by statute given immunity coextensive with his Fifth Amendment privilege, it would be destructive of that co-existence if the prosecution then is allowed complete freedom to interrogate the Trustee later. Moreover, it will be of no assistance for the prosecution simply to deny abuse of the privilege (although they have not, to this point, done even that much; because they purport to have no knowledge of the facts covered by the immunity. Inasmuch as the Defendant did not even know of the prosecution-trustee conference until he cross-examined the Trustee, near the end of the trial, the Defendant has had no possible opportunity to know if, or to what extent, there may have been a violation in this specific case.

There is usually, as here, no way in which a Defendant will know just what investigation and interviews that the prosecution has conducted. Often the Defendant is told by the trial, or shortly before, what witnesses the prosecution will use, but it is not the use of the Trustee as a witness per se which creates the problem. Rather, it was the ex parte interrogation, or questioning, which creates the problem. While the Trustee would be a dangerous witness, being a possessor of privileged information, still the right of objection at the time could be adequate to protect the Defendant. On the other hand, there is simply no way in

which the Defendant could know the scope of the private interview. It could have been short and casual, it could have been so informative as to have told the prosecution where to go to put together its case, or it could have been anywhere in between. This knowledge of what it really was rests solely within the mind of the prosecution, which still gives no assistance on the point.

The opinion below evidently mistakes Appellant's position to be simply an objection to the Trustee's in court testimony, which is then disposed of by a failure to object and the fact that the Trustee's testimony dealt with objective testimony, so that the Defendant can be clear in his legal position, he does not now and he did not then object to the Trustee testifying. He objects to the secret, pre-trial, ex parte conference and the failure of the prosecution to even try to meet the burden this Court has placed upon it to show that it has not obtained, and utilized, forbidden evidence. The prosecution's insistence on the appeal that Defendant must first prove actual mis-use is especially galling since the Defendant does not know and cannot know what was discussed in the conference. If the prosecution is still to be permitted to keep the conference secret, then this Defendant will never know that which the prosecution would require him first to set forth. This is only common sense, and no doubt the reason that the burden was placed upon the prosecution by this court in the first place.

Can the burden be met by having the Bankruptcy Trustee himself testify that there was no breach? This Court holds that it can, but the Defendant respectfully suggests that this is not a sufficient protection to one

who has been compelled to testify without Fifth Amendment immunity because a bankruptcy trustee is not necessarily (and often not in fact) even an attorney, much less an attorney with some expertise in federal criminal law and Constitutional protections.

Defendant does not mean to suggest that prosecutors should never interview bankruptcy trustees, but only that some reasonable safeguards be employed when such does occur. These could include (a) preliminary instructions as to the limited use immunity and its preclusions (b) having the attorney for the Defendant present or (c) perhaps no more than a witness statement to be prepared and furnished to the Defendant at time of trial so that he may have some clue as to whether a breach may exist. With none of these, or some further equivalent, the Defendant is completely in the dark and frustrated at the outset when he is told to give a specific example of mis-use.

Even if the prosecution has no duty in advance to advise the Court and Defendant of the interview with Trustee, surely once that fact is developed in cross-examination he should then go forward to fulfill his burden of showing no violation of the immunity exists.

We deal here with a very important issue of public policy. Once it has been determined that public knowledge of a particular area is of such consequence that Fifth Amendment rights must be avoided, then that testimony must be compelled. Congress has made that determination in bankruptcy matters. The Defendants here (both Appellant McDonnel as well as Co-Defendant Pao) recognized their legal duties, they did

not raise Fifth Amendment privileges but obeyed the Bankruptcy Judge's order and the Congressional statute of limited use immunity. All they ask, in return, is the enforcement of those rules prescribed in the cases that compelled this conduct, such as the *Kastigar* decision.

Should this case stand, and the practice here employed be condoned, then society's need to know, as expressed by Congress, may suffer a set back. Future bankrupts may once again refuse to testify, contending that the immunity is not co-extensive with the Fifth Amendment. Such a contention would not appear to be frivolous, if this conviction should stand.

PRAYER

For the foregoing reasons, the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit should be granted.

Respectfully submitted,

PALMER, PALMER & COFFEE

Philip I. Palmer, Jr.
840 One Main Place
Dallas, Texas 75250

CERTIFICATE OF SERVICE

All parties required to be served with copies of the Petition for Writ of Certiorari have been served. Three copies of the Petition for Writ of Certiorari were served upon the Solicitor General by depositing same in a United States mail box, with air mail postage prepaid, addressed to Solicitor General, Department of Justice, Washington, D.C. 20530, on the ____ day of June, 1977. Three copies of the Petition for Writ of Certiorari were served upon the United States Attorney by depositing same in a United States mail box, with first class postage prepaid, addressed to Judith A. Shepherd, Esq., 1100 Commerce St., 16-G-28, Dallas, Texas 75242 on the ____ day of June, 1977.

Philip I. Palmer, Jr.

APPENDIX

UNITED STATES of America,
Plaintiff-Appellee,

v.

Jesse M. McDONNEL,
Defendant-Appellant.

No. 76-3794
Summary Calendar.*
United States Court of Appeals, Fifth Circuit.
April 14, 1977.

Appeal from the United States District Court for the Northern District of Texas.

Before COLEMAN, GODBOLD and TJOFLAT, Circuit Judges.

PER CURIAM:

Appellant and Joseph Pao were charged with twelve counts of mail fraud. Pao pleaded guilty and received a sentence of three years. He did not testify at appellant's trial. McDonnel was found guilty on all counts and was sentenced to a total of ten years.)

McDonnel and Pao operated a partnership known as Southwest Coin Company which engaged in the business of selling bags of silver coins. Customers bought on margin, made a down payment, and were

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* Rule 18, 5 Cir.; *see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al.*, 5 Cir. 1970, 431 F.2d 409, Part I.

charged interest and storage charges for the coins. The investors testified that they understood that a bag of coins had been purchased in their names, tagged, and stored in a vault. At the time of the termination of the business, less than nine full bags of coins were found, though 998 had been purchased. None of the bags were tagged. McDonnel contended that the business had been operated like a bank, with only a small percentage of the silver on hand to meet the daily demands. The majority of investor's money was used to speculate in the silver commodities market. When the market was cornered, the business failed.

At trial the trustee of appellant's bankruptcy was called by the prosecution. Mr. Tygrett testified as to the number of creditors, the assets on hand, the types of records kept, etc. He stated that he would object to appellant's discharge in bankruptcy due to unaccounted for assets. On cross-examination, appellant's attorney questioned the trustee about his dealings with the U. S. Attorney's Office and the postal inspectors. Tygrett testified that he answered their questions based on his investigation of the bankrupt, *but with the exception of the information gotten from the examination of McDonnel and Pao under derivative use immunity*. No objection was offered to the trustee's testimony, but appellant argues for the first time on appeal that the provisions of 11 U.S.C. § 25(a) were violated by the trustee's testimony.

The other asserted error on appeal is that the court erred in permitting the investors to testify as to the representations made to them by appellant and his salesmen and brokers. Most of this testimony was to the effect of tagging and storing the bags of silver. At

the time this testimony was given, the court instructed the jury on the co-conspirator exception to the hearsay rule and the purpose for which the testimony was admitted.

11 U.S.C. § 25(a)(1) provides that the bankrupt must submit to an examination concerning the conduct of his business, dealings with his creditors, etc., "but no testimony, or any evidence which is directly or indirectly derived from such testimony, given by him shall be offered in evidence against him in any criminal proceeding . . .". It is argued that this rule was violated when the trustee testified for the prosecution at his trial. There was no objection to the trustee's testimony. The trustee stated that his testimony was based on his investigation, not including the immunized testimony of Pao and McDonnel.

In *United States v. Seiffert*, 5 Cir. 1974, 501 F.2d 974, we reviewed this provision dealing with derivative use immunity for bankrupts. There objection was raised at trial. The case was remanded for a hearing as to the independent source of the evidence. Here the trustee testified as to the records in his keeping, the inventory of the assets, number of creditors, etc. It was only on cross that appellant sought to establish the trustee's cooperation with the government. The trustee stated his answers had been based on that part of his investigation separate from the objected-to testimony, that it was based on other sources.

In *Seiffert* we held that the government need only prove the independence or its sources by a preponderance of the evidence. Tygrett's testimony deals with objective facts and records. None of the

government's exhibits were objected to. Appellant alleges that his immunity was somehow breached, but does not give any specific example of same. Under these circumstances, the government has sustained its burden of proof. Appellant has not demonstrated that the immunity was breached, or that plain error was committed since he is now objecting to the trustee's testimony for the first time on appeal. F.R.Cr.P. Rule 52(b).

The other contention is that the trial court erred in admitting the testimony of the defrauded investors as to the representations made to them by appellant and others employed by Southwest Coin as to the method of operation and how the coins were being handled. The evidence was admitted and the jury was instructed about the co-conspirator exception to the hearsay rule. Appellant argues this rule was inapplicable since no conspiracy was charged in the indictment.

Appellant misses the point. The government introduced the statements not to prove the truth of the matter asserted. On the contrary, the point was to prove that the statements were made so as to establish a foundation for later showing, through other admissible evidence, that they were false. The hearsay rule does not apply. *See Anderson v. United States*, 417 U.S. 211, 219-220, 94 S.Ct. 2253, 41 L.Ed.2d 20 (1974). The instruction here, though superfluous, was correct and has been repeatedly approved by us. *See United States v. Apollo*, 5 Cir. 1973, 476 F.2d 156, 162-164.

Appellant's objections about the trustee's testimony and the admission of hearsay evidence are without merit.

The Judgment of the District Court is AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 76-3794

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus

JESSE M. McDONNEL,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

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ON PETITION FOR REHEARING
(May 24, 1977)

Before COLEMAN, GODBOLD and TJOFLAT, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED

ENTERED FOR THE COURT:

/s/ J. P. COLEMAN
United States Circuit Judge

[Filed: May 24, 1977]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 76-3794

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JESSE M. McDONNEL,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

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ORDER:
The motion of Appellant for stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including June 23, 1977, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

/s/ JAS. P. COLEMAN
UNITED STATES
CIRCUIT JUDGE

[Filed: June 7, 1977]

No. 76-1829

In the Supreme Court of the United States

OCTOBER TERM, 1977

JESSIE M. MCDONNEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

BENJAMIN R. CIVILETTI,
Assistant Attorney General,

JEROME M. FEIT,
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In the Supreme Court of the United States

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JESSIE M. MCDONNEL, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is reported at 550 F. 2d 1010.

JURISDICTION

The judgment of the court of appeals was entered on April 14, 1977. A petition for rehearing was denied on May 24, 1977 (Pet. App. 5a). The petition for a writ of certiorari was filed on June 22, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's right against self-incrimination was violated by a pre-trial meeting between the prosecutor and the trustee in bankruptcy, where the trustee did not disclose any information received from petitioner's immunized testimony.

STATUTE INVOLVED

11 U.S.C. 25(a), provides in pertinent part:

> The bankrupt shall * * * (10) at the first meeting of his creditors, * * * and at such other times as the court shall order, submit to an examination concerning the conduct of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate or the granting of his discharge; but no testimony, or any evidence which is directly or indirectly derived from such testimony, given by him shall be offered in evidence against him in any criminal proceeding * * *.

STATEMENT

After a jury trial in the United States District Court for Northern District of Texas, petitioner was convicted of twelve counts of mail fraud, in violation of 18 U.S.C. 1341. He was sentenced to consecutive terms of five years' imprisonment each on Counts 1 and 2, and to terms of five years' imprisonment on the remaining counts, to be served concurrently with each other and Count 1.[1] The court of appeals affirmed *per curiam* (Pet. App. 1a-4a).

The evidence adduced at trial established that petitioner and co-defendant Pao operated the Southwest Coin Exchange from early 1973 until May 16, 1974, when the partnership filed a bankruptcy petition (Tr. 251, 294). Southwest Coin Exchange sold bags of silver coins for investment purposes to customers who were encouraged to buy on margin, so they could acquire as many bags as

[1]Co-defendant Joseph W. Pao pleaded guilty to Counts 1, 2, and 3. He received concurrent terms of three years' imprisonment on Counts 1 and 2, followed by a probationary term of three years on Count 3.

possible. For each bag ordered, Southwest was to purchase a bag of silver coins, tag it with the customer's name, and store it in a vault. Delivery could be taken on one day's notice and payment of the full purchase price and accrued interest (*e.g.*, Tr. 73, 80-82, 104-105, 124).

Contrary to its representations to investors, Southwest did not fill purchase orders and the silver available for delivery was usually only a small percentage of that contracted for (Tr. 294-299). When Southwest petitioned for bankruptcy, the firm had outstanding contracts for delivery of 998 bags of silver coins, but less than nine bags were on hand (Tr. 252-253, 310). Furthermore, an examination of the company's records disclosed that the majority of the investors' money was used for speculation in the commodity market and foreign gold mine stocks (Tr. 307-309), although investors were never informed that their funds were used for any purpose other than the purchase and storage of bags of silver coins (*e.g.*, Tr. 83, 96, 110, 118-119, 127).

Petitioner's misrepresentations resulted in an out-of-pocket loss to Southwest investors of approximately $921,000 and a loss of 3.8 million dollars based on the market value of silver when the petition for bankruptcy was filed (Tr. 251, 309-310).

Petitioner testified before the trustee in bankruptcy under the use immunity conferred by 11 U.S.C. 25(a) (Tr. 262-263).

ARGUMENT

Petitioner contends that his conviction must be reversed because after he testified in bankruptcy proceedings, there was a conference between the prosecutor and the trustee in bankruptcy of Southwest Coin Exchange.

1. As the court of appeals held (Pet. App. 4a), petitioner did not object at trial to any portion of the trustee's

testimony, and therefore has waived whatever objection he may have had, unless admission of the testimony was plain error. Fed. R. Crim. P. 52(b). Petitioner attempts to avoid this formidable hurdle by claiming that his objection is not to the testimony itself, but to the pre-trial contact between the trustee and the prosecutor (Pet. 8). This argument overlooks the fact that petitioner's claim is one of self-incrimination; consequently, his objection must go to the evidence introduced against him at trial or there is nothing to object to. Petitioner cannot be incriminated by an informal conference occurring prior to trial, no matter what occurred there; he can be incriminated only by evidence put before the jury at trial. See *Napolitano* v. *Ward*, 457 F. 2d 279 (C.A. 7). Consequently, his failure to object at trial defeats his present claim save as to plain error.

2. Moreover, here as in the court of appeals, petitioner "alleges that his immunity was somehow breached, but does not give any specific example of same" (Pet. App. 4a). Petitioner's argument (Pet. 7) that he "has had no possible opportunity to know if, or to what extent, there may have been a violation [of his privilege] in this specific case" is unconvincing. Petitioner knows what his testimony before the trustee was (indeed, the testimony was transcribed and petitioner presumably has a copy of the transcript). Petitioner was also present throughout the two-day trial and heard the evidence against him.

If petitioner or his counsel had genuine grounds to believe that his privileged testimony somehow led to evidence used against him at trial, there is no reason why he did not make some claim, either at trial, *in camera*, or at the very least in a post-judgment motion, setting forth the connection, thus putting the burden of showing an independent source on the government. *Kastigar* v. *United States*, 406 U.S. 441, 459-462. The fact that petitioner was absent from the conference between the trustee and the prosecutor is irrelevant. His failure even to suggest the manner in which his privilege was allegedly violated further undercuts the validity of that claim.

3. In any event, the government has fully met its burden of proving that the evidence against petitioner had an independent source, as *Kastigar* requires. The trustee's entire (and uncontradicted) testimony on this point follows (Tr. 262-263):

> [by petitioner's counsel, on cross-examination]
>
> Q. All right, sir. Have both Mr. Pao and Mr. McDonnel submitted to interrogation in the bankruptcy proceedings?
>
> A. Yes, sir.
>
> Q. And they have been examined there under oath and pursuant to Court Order?
>
> A. Yes, sir.
>
> Q. And were the facts that you learned from those two investigations part of your overall investigation into the affairs of Southwest Coin?
>
> A. Yes, sir.
>
> Q. Prior to your testimony here today have you had any conversations with either the United States Attorney or the Postal Inspectors?
>
> A. Yes, sir.
>
> Q. And have you attempted to assist them in the performance of their duties?
>
> A. I have answered their questions that they have asked me.

Q. And you have answered those questions based upon, I assume, all of the information developed in your investigation?

A. With the exception of the information returned from Mr. Pao, Mr. McDonnel, through examination in the bankruptcy proceedings, with the exception of that, yes.

Q. You mean you were able in your mind to sort of sever out what you learned from that and just tell them what you learned from other sources?

A. Yes, sir.

Q. I see.

MR. PALMER: I'll pass the witness.

Thus, the trustee's "testimony that he had not transmitted outside of his office any information about [petitioner's] appearance is sufficient to show no use by federal agents of any information garnered from that appearance." *United States* v. *Bianco*, 534 F. 2d 501, 510 (C.A. 2). If the prosecution did not know the substance of the privileged testimony, it could not have used the testimony or its fruits in developing or prosecuting the case against petitioner. It necessarily follows that the evidence against petitioner "was derived from legitimate independent sources" (*Kastigar, supra*, 406 U.S. at 461-462), and the court of appeals correctly so held (Pet. App. 4a).[2]

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[2]Petitioner's concern that a trustee untrained in the law might be unable to comply with the requirement that immunized testimony not be divulged to the prosecutor is without foundation in the present case. The trustee was an attorney experienced in bankruptcy law (Tr. 248-250), and both the trustee and the prosecutor were fully cognizant of their duties under the immunity provision (Tr. 213, 262-263).

Moreover, petitioner appears to concede (Pet. 5) that the government's burden of proving non-use of the immunized testimony would have been met if the prosecutor had appeared at the first meeting of creditors and requested that neither the transcript nor its contents be disclosed. There is no significant difference between that procedure and the facts of this case, since the prosecutor did not seek the immunized testimony (Tr. 213) and the trustee did not disclose it (Tr. 262-263).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

BENJAMIN R. CIVILETTI,
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JEROME M. FEIT,
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Attorneys.

SEPTEMBER 1977.